



1410-72-P

LIBRARY OF CONGRESS

Copyright Royalty Board

37 CFR Part 387

[Docket No. 15-CRB-0010-CA-S]

Adjustment of Cable Statutory License Royalty Rates

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Final rule.

SUMMARY: The Copyright Royalty Judges (Judges) publish a final rule requiring affected cable systems to pay a separate per-telecast royalty (a Sports Surcharge) in addition to the other royalties that those cable systems must pay under Section 111 of the Copyright Act.

DATES: *Effective date:* [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability date: January 1, 2019.

ADDRESSES: Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 15-CRB-0010-CA-S.

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: On July 30, 2018, the Copyright Royalty Judges (Judges) published a modified proposed rule that establishes affected cable

operators' obligation to pay a Sports Surcharge royalty. 83 FR 36509.

The Judges solicited general comments for or against the proposal and specific comments on the following questions: Could the proposed provision in section 387.2 (e)(9) ("Nothing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule, from receiving a share of royalties paid pursuant to this paragraph.") apply to the secondary transmissions of the live television broadcasts of any entity *other than* a current member of the Joint Sports Claimants (JSC)?¹ If the answer is yes, which entities' transmissions would qualify for a share? If the answer is no (*i.e.*, only JSC members could qualify), then is the current proposal nevertheless consistent with the section 111 license? If so, why? *Id.* at 36511.

The Judges received joint comments from the JSC, NCTA-The Internet & Television Association, and American Cable Association stating support for the modified proposed rule as consistent with the section 111 license, answering the question in the affirmative, and specifying that "non-JSC members (*e.g.*, MLS)"² might qualify for a share of the royalties. Joint Comments of the Moving Parties at 5. The Judges received no other comments.

The joint commenters point out that the focus of the proposed rule is to specify the circumstances in which cable systems will owe and make Sports Surcharge royalty payments, *i.e.*, a "pay-in" methodology. *Id.* at 4. The modified proposed language applies to Surcharge payments for events of JSC members *and other entities*, if any, who

¹ The Joint Sports Claimants are the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the Women's National Basketball Association, the National Hockey League, and the National Collegiate Athletic Association

² Major League Soccer.

sought protection under the Sports Blackout Rule in the two years prior to its repeal. The joint commenters are not aware of any other protected entities, but they proposed removing the reference to the JSC in the rule to address the Judges' concern that the language in the rule as originally proposed appeared limiting and exclusionary. Although JSC members may be the only entities that invoked the protection, even entities who did not invoke the protection may be entitled to receive a share of the Surcharge funds in the future. *Id.* at 5-6. The modified proposed rule also eliminates the reference to "eligible" sports events as it only included by definition JSC-member events. *Id.* at 3-4.

The joint commenters believe the original proposed rule did not implicate any of the concerns the Judges expressed because distribution of shares is not a subject of this rule. Distribution of royalty fees will be determined by the Judges or by agreement of interested parties. The modified proposed rule nonetheless states expressly that copyright owners are not precluded from sharing in future payments for the regulated secondary transmissions. *Id.* at 4, 6.

The removal of the references to JSC-member events in the proposed rule and the addition of the section clarifying that no entity will be precluded from receiving shares based on this rule allay the concerns of the Judges.

List of Subjects in 37 CFR Part 387

Copyright, Cable Television, Royalties

For the reasons set forth in the preamble, and under the authority of chapter 8, title 17, United States Code, the Copyright Royalty Judges amend 37 CFR chapter III as follows:

PART 387—ADJUSTMENT OF ROYALTY FEE FOR CABLE COMPULSORY

LICENSE

1. The authority citation for part 387 continues to read as follows:

Authority: 17 U.S.C. 801(b)(2), 803(b)(6).

2. Amend §387.2 by redesignating paragraph (e) as paragraph (f) and adding a new paragraph (e) to read as follows:

§ 387.2 Royalty fee for compulsory license for secondary transmission by cable systems.

(e) *Sports programming surcharge.* Commencing with the first semiannual accounting period of 2019 and for each semiannual accounting period thereafter, in the case of an affected cable system filing Form SA3 as referenced in 37 CFR 201.17(d)(2)(ii) (2014), the royalty rate shall be, in addition to the amounts specified in paragraphs (a), (c), and (d) of this section, a surcharge of 0.025 percent of the affected cable system's gross receipts for the secondary transmission to subscribers of each live television broadcast of a sports event where the secondary transmission of that broadcast would have been subject to deletion under the FCC Sports Blackout Rule. For purposes of this paragraph:

(1) The term "cable system" shall have the same meaning as in 17 U.S.C.

111(f)(3);

(2) An "affected cable system"—

(i) Is a "community unit," as the comparable term is defined or interpreted in accordance with §76.5(dd) of the rules and regulations of the Federal Communications Commission, in effect as of November 23, 2014, 47 CFR 76.5(dd) (2014);

(ii) That is located in whole or in part within the 35-mile specified zone of a

television broadcast station licensed to a community in which a sports event is taking place, provided that if there is no television broadcast station licensed to the community in which a sports event is taking place, the applicable specified zone shall be that of the television broadcast station licensed to the community with which the sports event or team is identified, or, if the event or local team is not identified with any particular community, the nearest community to which a television station is licensed; and

(iii) Whose royalty fee is specified by 17 U.S.C. 111(d)(1)(B);

(3) A “television broadcast” of a sports event must qualify as a “non-network television program” within the meaning of 17 U.S.C. 111(d)(3)(A);

(4) The term “specified zone” shall be defined as the comparable term is defined or interpreted in accordance with §76.5(e) of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.5(e) (2014);

(5) The term “gross receipts” shall have the same meaning as in 17 U.S.C. 111(d)(1)(B) and shall include all gross receipts of the affected cable system during the semiannual accounting period except those from the affected cable system’s subscribers who reside in:

(i) The local service area of the primary transmitter, as defined in 17 U.S.C. 111(f)(4);

(ii) Any community where the cable system has fewer than 1000 subscribers;

(iii) Any community located wholly outside the specified zone referenced in paragraph (e)(4) of this section; and

(iv) Any community where the primary transmitter was lawfully carried prior to March 31, 1972;

(6) The term “FCC Sports Blackout Rule” refers to §76.111 of the rules and regulations of the Federal Communications Commission in effect as of November 23, 2014, 47 CFR 76.111 (2014);

(7) Subject to paragraph (e)(8) of this section, the surcharge will apply to the secondary transmission of a primary transmission of a live television broadcast of a sports event only where the holder of the broadcast rights to the sports event or its agent has provided the affected cable system—

(i) Advance written notice regarding the secondary transmission as required by § 76.111(b) and (c) of the FCC Sports Blackout Rule; and

(ii) Documentary evidence that the specific team on whose behalf the notice is given had invoked the protection afforded by the FCC Sports Blackout Rule during the period from January 1, 2012, through November 23, 2014;

(8) In the case of collegiate sports events, the number of events involving a specific team as to which an affected cable system must pay the surcharge will be no greater than the largest number of events as to which the FCC Sports Blackout Rule was invoked in a particular geographic area by that team during any one of the accounting periods occurring between January 1, 2012, and November 23, 2014;

(9) Nothing herein shall preclude any copyright owner of a live television broadcast, the secondary transmission of which would have been subject to deletion under the FCC Sports Blackout Rule, from receiving a share of royalties paid pursuant to this paragraph (e).

Dated: October 1, 2018.

David R. Strickler
Copyright Royalty Judge

Jesse M. Feder
Copyright Royalty Judge

Suzanne M. Barnett
Chief Copyright Royalty Judge

Approved by:

Dr. Carla D. Hayden,
Librarian of Congress
[FR Doc. 2018-26275 Filed: 12/4/2018 8:45 am; Publication Date: 12/6/2018]